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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

454

ROBERT D. MORGAN,

Petitioner,

vs.

JACK D. H. HAYS, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF MARICOPA,
AND SAID SUPERIOR COURT,

and

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,
Real Party in Interest,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

ROBERT D. MORGAN,

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vs.

JACK D. H. HAYS, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF MARICOPA,
AND SAID SUPERIOR COURT,

and

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,

Real Party in Interest,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Arizona, entered in the above entitled case April 12, 1967.

The opinion of the Supreme Court of Arizona is reported at ...., Ariz. ...., 426 P.2d 647 (1967). It is attached as Appendix "B" hereto.

JURISDICTION

The judgment and decision of the Arizona Supreme Court reviewing by certiorari the propriety of a motion to dismiss by the Superior Court, was rendered and entered April 12, 1967. Chief Justice Charles C. Bernstein and Justice Fred C. Struckmeyer, Jr., joined in a written dissent. Petitioner's petition for rehearing was denied May 10, 1967, with Justices Bernstein and Struckmeyer dissenting.

The jurisdiction of this Court is invoked by reason of the provisions of Title 28 United States Code § 1257(3).

QUESTIONS PRESENTED

1. Despite the commands of the Seventh and Fourteenth Amendments to the Constitution of the United States, may an Arizona Superior Court refuse a plaintiff a jury trial seasonably demanded upon the fact issues which must be resolved in making a determination as to whether or not a workman is within the coverage of the Arziona Workmen's Compensation Act or alternatively, has an option to maintain a common-law negligence action when these fact issues are interwoven with the fact issues of the total case and the evidence is in sharp dispute?

2. May a Superior Court Judge, on a defendant's motion to dismiss, grant the defendant's affirmative defenses of *"waiver, release* and *election of remedies"* in view of the Federal Constitutional mandates which afford Petitioner a trial by jury by virtue of the applicability of the Due Process clause of the Fourteenth Amendment to the states?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions which are involved will be set forth verbatim in Appendix "A".

The Seventh and Fourteenth Amendments to the Constitution of the United States. (App. A-12)
Section 23-906 Ariz. Rev. Stat. §§ D. and E. (App. A-12)

STATEMENT OF THE CASE

Robert D. Morgan, Petitioner, was employed by Metro-Gold-

wyn-Mayer, Inc., (hereinafter referred to as "MGM") prior to April 9, 1962, as a stunt man in the filming of the movie, "How the West was Won." On location near Superior, Arizona, on that day, while in discharge of his duties, he was knocked under the wheels of a railroad car due to the reckless conduct of an assistant director, as a result of which Morgan suffered gross and crippling injuries. His right eye was destroyed, his left leg was caused to be substantially amputated above the knee, and he was otherwise most severely injured about the face, head and body.

On December 13, 1962, Morgan filed a civil damage action against MGM in the Superior Court of Maricopa County, Arizona. This complaint was bottomed upon the common-law right of an employee to sue his employer for injuries sustained in the course of his employment. Morgan alleged:

(a) His employment by MGM;

(b) That he was directed to participate, as a part of his employment, in a dangerous and hazardous stunt;

(c) That another employee who was also assisting in said stunt was, to MGM's knowledge, incapable of conducting and participating in said stunt and, to the employer's knowledge, likely to cause injury to Morgan and others;

(d) Said employee negligently, carelessly and recklessly caused certain logs on the train used in said stunt to shift, knocking Morgan under the wheels of the train and causing the train to run over him, thereby inflicting the described injuries upon Petitioner, causing him permanent injury and loss;

(e) That MGM on the date of his injury had wholly failed to comply with the requirements of Section 23-906, A.R.S. that notices be posted and rejection blanks be made available to all employees and that for MGM's failure to so do, Morgan accordingly elected to sue his employer for his injuries.

MGM answered and subsequently filed a motion, in effect requesting the Court to try the fact issues involved in making a determination as to whether or not Morgan was within the coverage of the Compensation Act when injured and hence could not sue, in

advance of the trial on other fact issues in the case, sitting without a jury. The Superior Court agreed with the contentions of MGM and severed this phase of Morgan's case and set it for trial before the court without a jury despite the fact a jury trial had been seasonably demanded on all fact issues.

On the motion to dismiss the trial judge received sharp conflicting testimony on, and decided these fact issues:

(a) Were notices posted as required by Section 23-906, A.R.S.?

(b) Were rejection slips available as required by the statute?

(c) Had Morgan waived his optional right to sue MGM and elected to accept workmen's compensation benefits, thereby raising sub-issues of fact as to (1) his deteriorated mental and physical ability to act knowledgeably or at all, since he was suffering from gangrene, septicemia and bacteremia some two weeks after the accident when he purportedly signed the election of remedies, at which time all available life saving measures were being carried out to save him, (2) was he advised of his rights, before he accepted compensation checks, and if so, were counsel who advised him misled by Industrial Commission employees as to the facts relating to MGM's compliance with Section 23-906?

After this non-jury hearing, the trial judge found against Morgan and made findings of fact and conclusions of law and entered judgment dismissing Morgan's complaint, as amended.

In its findings and conclusions, the trial court found that the notices required by Section 23-906, A.R.S. had *not been* posted, but that Morgan had actual knowledge that MGM had a workmen's compensation polciy and that "actual knowledge is better than constructive knowledge" (statutory restriction), and hence Morgan could not sue.

Thereafter, the Supreme Court of Arizona granted a Writ of Certiorari for the purpose of passing upon the question of whether Petitioner was entitled to a jury trial and whether a motion to dismiss was the proper procedure to determine the foregoing issues.

REASONS FOR GRANTING THE WRIT

A. THE HOLDING OF THE MAJORITY OF THE ARIZONA SUPREME COURT IN DENYING PETITIONER THE RIGHT TO TRIAL BY JURY CONFLICTS WITH AMENDMENTS SEVEN AND FOURTEEN TO THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The majority opinion emasculates the provisions of the Seventh Amendment to the United States Constitution which provides in part: *"The right to trial by jury shall be preserved. . . ."*; this mandatory command guarantees preservation of the right of a trial by jury. Until *this case,* Arizona has recognized this guarantee. *Rothweiler v. Superior Court of Pima County,* 100 Ariz. 37, 410 P.2d 479 (1966); *State v. Cousins,* 97 Ariz. 105, 397 P.2d 217 (1964); *Brown v. Greer,* 16 Ariz. 215, 141 Pac. 841 (1914). It is axiomatic that in a common-law action for negligence Morgan is guaranteed the preservation of a jury trial seasonably demanded. *Alabam's Freight Co. v. Hunt* 29 Ariz. 419, 242 Pac. 658 (1926). Yet, the trial court under the guise of "jurisdiction", determined that a motion to dismiss was proper procedure to take evidence and determine factual issues without a jury.

The Supreme Court of Arizona predicated its decision herein upon the antiquated Arizona decision of *State v. Pressley,* 74 Ariz. 412, 250 P.2d 992 (1952), *(which never took into consideration the constitutional issue of a trial by jury). Pressley,* supra, is bottomed upon the Ninth Circuit case of *Taylor v. Hubbell* 188 F.2d 106. It is interesting to note the discussion by plaintiff's attorney in *Taylor v. Hubbell,* supra, now Congressman Morris K. Udall, wherein he analyzes the *Taylor* case and the later *Pressley* case in his booklet entitled *"Alternative Remedies for Industrial Injuries"* Section 16 entitled *"The Election Question—For Court or Jury?";* therein Mr. Udall points out the error now compounded by the majority of the Arizona Supreme Court. See at page 29:

"In Hubbell, tried in the U.S. District Court, both parties were agreed that the election question was one for the jury. However, the trial court determined the issue as a matter of law and refused to submit it to the jury. The Court of Appeals affirmed plaintiff's judgment on the ground that whether there had been an election went to the jurisdiction of the court, and that such questions could be decided without aid of jury. In effect the holding, turning on a Federal jurisdictional point, was that there was no reversible error in the trial court's action. However, the procedure followed was not recommended as proper and desirable in every instance. In *State v. Pressley* the Arizona Court seized upon this holding and expanded it into a doctrine that questions of election MUST in every situation be determined by the court. *It is submitted that the holding is squarely against Article 2, Section 23, of the Constitution preserving trial by jury as an absolute right in all situations and as to all issues. Other decisions indicate that the Supreme Court is without power to adopt any rule abridging or modifying a party's universal right to jury trial.* It is suggested that the criticized portion of the *Pressley* decision was made in unjustified reliance on the *Hubbell* case, without a proper understanding of the peculiar basis of the Hubbell holding, and without consideration of the constitutional point just discussed." (Emphasis supplied.)

Since the rendition of *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 2 L.Ed.2d 953, 78 S.Ct. 893 (1958), which deals directly with the necessity of jury trials in workmen's compensation cases, the Ninth Circuit hence recognized the error of *Taylor v. Hubbell,* and has completely repudiated same, see *Marks Food Corporation v. Barbara Ann Baking Co.* (9th Cir. 1959) 274 F.2d 934, relying and quoting heavily from *Beacon Theatres v. Westover,* 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959). See the footnote at page 935 of 274 F.2d:

"The theory that the existence of an effect on interstate commerce is a jurisdictional fact, enabling the judge to determine the issue for himself—see e.g., Gilbert v. David, 235 U.S. 561, 35 S.Ct. 164, 59 L.Ed. 360; and Stauffer v. Exley, 9 Cir., 184 F.2d 962,—*will in practice deprive plaintiffs of their right to a jury trial.* See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988; Bertha Bldg. Corp. v. National Theatres Corp., 2 Cir., 248 F.2d 833, certiorari

denied 356 U.S. 936, 78 S.Ct. 777, 2 L.Ed.2d 811; and Ring v. Spina, 2 Cir., 166 F.2d 546. *Anything which may appear in Taylor v. Hubbell, 9 Cir., 188 F.2d 106, should be read in the light of Byrd v. Blue Ridge Elec. Co-op, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953.*" (Emphasis supplied)

Wherefore, *Morgan v. MGM* stands without precedent.

It is noteworthy that the language of Section 23-906 §§ D. and E., A.R.S., by its historical note, discloses its adoption from the similar Ohio statute. The Circuit Court of Appeals for the Sixth Circuit, reversed the trial court, and held under Ohio law that the issue of election between a common-law negligence suit and workmen's compensation should have been submitted to the jury. *Smith v. Price Bros. Co.,* (6th Cir. 1942) 131 F.2d 750, cert. denied 318 U.S. 762, 87 L.Ed. 1134, 63 S.Ct. 560. See also the Ohio Supreme Court case of *Dice v. Akron, Canton and Youngtown R. Co.,* 91 Ohio 239, 108 N.E.2d 343 (1950), and *Young v. Duncan,* 218 Mass. 346, 106 N.E. 1 (1914). Questions relating to election of remedies under workmen's compensation statutes have repeatedly guaranteed that all evidence must manifestly be submitted to a jury. See the oft cited case of *Johnson v. American-Hawaiian S.S. Co.* (9th Cir. 1938), 98 F.2d 847. Earlier the Ninth Circuit, in *Miles v. Lavender,* (9th Cir. 1926), 10 F.2d 450, recognized the necessity of a jury trial *when expressly* dealing with the question of *election of remedies* under *The Arizona Workmen's Compensation Act.*

The majority opinion ignores the prior Arizona decision that the jury is entitled to determine any competent evidence as to whether the defendant employer posted a notice as required by the statute. See *Jeune v. Del E. Webb Const. Co.,* 76 Ariz. 418, 265 P.2d 1076 (1954), at p. 1078:

> "The important issue to determine in this appeal is whether appellant submitted any *competent evidence that entitled him to go to the jury upon the ground that defendant-appellee failed to post a notice as required by the statute.*" (Emphasis supplied)

There is no justification for the denial of due process. The right to trial by jury is encompassed in the Due Process clause

of the Fourteenth Amendment. This Court has delineated the guidelines which require the states to adhere to the fundamental principles of due process; *Parker v. Gladden,* .... U.S. ...., 17 L.Ed.2d 420, 87 S.Ct. 468 (1966); *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961); *Beacon Theatres v. Westover,* supra.

This Court in its leading opinion of *Byrd v. Blue Ridge Rural Elec. Coop.,* supra, recognized the "affirmative countervailing considerations" and discussed at length the necessity for trial by jury. Following thereafter in *Magenau v. Aetna Freight Lines,* 360 U.S. 273, 3 L.Ed.2d 1224, 79 S.Ct. 1184 (1959), this Court adhered to its conclusion expressed in *Byrd* that all fact questions in a workmen's compensation case should be submitted to a jury. The majority of the Arizona Supreme Court attempts to rationalize its disregard of the rights preserved by the Seventh and Fourteenth Amendments on the basis of the dissenting opinion in *Byrd,* supra. This attempt runs square in the face of *Byrd* requiring a jury trial in a similar case.

B. ELECTION OF REMEDIES, WAIVER, AND RELEASE ARE AFFIRMATIVE DEFENSES AND MAY NOT BE DECIDED ON A MOTION TO DISMISS IN PLACE OF A TRIAL BY JURY AS PRESERVED BY THE CONSTITUTION.

Numerous jurisdictions have determined that the election of remedies under workmen's compensation acts is always a question of fact to be submitted to a jury. See *Barton v. Oklahoma K. & M. Ry. Co.,* 96 Okla. 119, 220 Pac. 929 (1923); *Addison v. Tessier,* 62 N.M. 120, 305 P.2d 1067 (1957), at 1076:

> *"Whether the plaintiff had full knowledge of the nature of both his right to workmen's compensation benefits, and his right to maintain an action for damages;* and whether he abandoned his right to an action for damages in favor of accepting workmen's compensation benefits; and whether he knew or not that he had *a right to an action in damages at the time that he accepted workmen's compensation benefits, if he did so accept them, are all questions of fact to be determined from the evidence in reference thereto, and the issues were, therefore, properly submitted to the jury.* (Emphasis supplied)

See also Schneider's *Workmen's Compensation Text,* Vol. 1, Sec. 98 at p. 237-238.

> " . . . nor in the absence of a full knowledge of the right and duty to elect. *It has been held that ignorance of the compensation act is not a mistake of law. It is a mistake of fact.* 'Mistake of a person in respect of his own private legal rights and liabilities may be properly regarded * * * *and may be dealt with as a mistake of fact'.*" [Citing Pomeroy Equity Jurisprudence (4th Ed. 1918), 1731, § 849.] (Emphasis supplied)

and also

101 *C. J. S.* § 1032, p. 596

53 Am. Jur. § 221, p. 189, 190

Schneider's *Workmen's Compensation Text,* Vol. 1, § 86, p. 199, 200, § 91, p. 230

McVey v. Chesapeake Potomac Telephone Co., 106 W.Va. 331, 145 S.E. 578 (1928)

Holland v. Stuckey, 282 S.W. 951, 954 (Tex. 1926)

Kampmann v. Cross, 194 S.W. 437, 439, at 440 (Tex. 1917)

> "Defendant in an action for damages has a right to a jury trial on the question of whether the parties are subject to workmen's compensation act." 50 C.J.S., *"Juries,"* § 19, p. 734.

"The cases uniformly hold that questions of waiver are questions of fact to be submitted to the jury." See *Ross Engineering Co. v. Pace* (4th Cir. 1946) 153 F.2d 35 at page 50. When the facts of a case are in dispute regarding "waiver", said issues should be submitted to the jury. *Cannon v. Travelers Indemnity Company,* (8th Cir. 1963) 314 F.2d 657. It is elementary that the burden of proving waiver is upon the party asserting it. *Cowles v. Ohio Farmers Insurance Company,* (4th Cir. 1957) 242 F.2d 73; *Buffum v. Chase Nat. Bank of City of New York,* (7th Cir. 1951) 192 F.2d 58, cert. den. 342 U.S. 944, 96 L.Ed. 702, 72 S.Ct. 558.

In Arizona a waiver can only be effective when a jury determines the plaintiff knowingly had an opportunity to intentionally relinquish a right known to him. See *Arizona Title Guarantee & Trust Co. v. Modern Homes,* 84 Ariz. 399, 330 P.2d 113 (1958); *Murphey v. Valenzuela,* 95 Ariz. 30, 386 P.2d 78

(1963); *City of Tucson v. Koerber*, 82 Ariz. 347, 313 P.2d 411 (1957); *In re Brandt's Estate*, 67 Ariz. 42, 190 P.2d 497 (1948); *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 224 (1940); *Southwest Cotton Co. v. Valley Bank*, 26 Ariz. 559, 227 Pac. 986 (1924).

Therefore, only a jury should determine Morgan's relinquishment of his rights, as opposed to the summary deprivation of a jury trial under the occult device of a motion to dismiss.

The only evidence adduced at the motion to dismiss, medical or otherwise, as to Morgan's lucidity on the day of his pufported signature accepting benefits came from Petitioner's treating physicians who testified in essence that: he was administered 325 milligrams of demarol, that he underwent an operation on that same day, and further, that he was completely irrational and incapable of knowing anything for three days prior to his purported signature; that his right eye was sewn shut, he was positioned on a fracture bed with his gangrenous left leg open and draining, that his face and scalp were severely lacerated and infected, and that his sacrum and perineum areas were severely injured and infected, and that he had numerous other fractures and lacerations throughout his body. (See testimony of Drs. Jarrett and Hunter, treating physicians.)

It goes without saying that a jury trial should be afforded an injured and incompetent workman who purportedly executed a waiver and election under such circumstances. See *Sun Indemnity Co. v. Industrial Acc. Commission*, 85 C.A.2d 171, 192 P.2d 765 (1948); Schneider's *Workmen's Compensation Text*, Vol. 8, § 1882, at page 657; *Southwest Cotton Co. v. Valley Bank*, supra.

When the defendant, MGM, failed to comply with the provisions of A.R.S. § 23-906, by failing to post and keep posted the notices as required under this section, Morgan was then free to file and maintain a common-law action for negligence.

The finding of the trial court that Morgan "had knowledge" that MGM had a workman's compensation policy does not permit the trial court to circumvent the strict requirements of posting of notices which must be present so that Petitioner's rights under due

process of law are not violated. A compensation statute of this nature is strictly construed against the employer, in order to afford Petitioner every due process of law. See *Span v. Jackson Walker Coal & Mining Co.*, 322 Mo. 158, 16 S.W.2d 190 (1929); *Murray v. Strike*, 76 Utah 118, 287 Pac. 922 (1930); Schneider's *Workmen's Compensation Text*, Vol. 1, § 90; *"Remedy under act exclusive, exceptions."* Arizona is listed in the footnote as adhering to this rule. See also *Larson v. Trageser*, 150 Minn. 182, 184 N.W. 833 (1921); *Sayles v. Kansas City Structural Steel Co.*, 344 Mo. 756, 128 S.W.2d 1046 (1939); *O'Rourke v. Percy Vittum Co.*, 166 Minn. 251, 207 N.W. 636 (1926); *Bernard v. Michigan United Traction Co.*, 188 Mich 504, 154 N.W. 565 (1915); *Hogue v. Wurdack*, 298 S.W.2d 492 (Mo. 1957). Where an employee was required to reject the workmen's compensation act prior to employment, it was stated in *Red Rover Copper Co. v. Industrial Commission*, 58 Ariz. 203, 118 P.2d 1102 (1941):

> " * * * the constitutional amendment and the legislation enacted thereunder declare the public policy of the State of Arizona. *No contractual consent, no statute of limitations, no laches nor estoppel can prevail against public policy, and any agreements made and any acts done in violation of it are necessarily void.* * * * " (Emphasis supplied)

CONCLUSION

This Court has consistently rejected the decisions of states that tread upon the constitutional liberties of individuals and emasculate the guaranteed fundamentals of due process. The denial of a trial by a jury withholds from the individual perhaps his most sacred constitutional preservation. It is respectfully submitted that for the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA REVISED STATUTES § 23-906

D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form:

"All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of such law, and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company."

E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place

where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

ROBERT D. MORGAN,
Petitioner,
vs.
JACK D. H. HAYS, Judge, Superior Court of the State of Arizona, in and for the County of Maricopa, and said SUPERIOR COURT,
Respondents,
and
METRO-GOLDWYN-MAYER, INC.
Real Party in Interest

No. 8653

Review by Certiorari from the Superior Court
The Honorable Jack D. H. Hays, Judge
AFFIRMED

SNELL & WILMER — Phoenix
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McFarland, Justice:

Robert D. Morgan, hereinafter referred to as petitioner, filed a petition with this court seeking issuance of a writ of certiorari to test the propriety of the granting of a motion to dismiss by

Jack D. H. Hays, Judge of the Superior Court, Maricopa County, hereinafter referred to as respondent, in an action brought by petitioner against Metro-Goldwyn-Mayer, Inc., a Delaware corporation, real party in interest, hereinafter referred to as MGM.

Petitioner filed a complaint in Superior Court, Maricopa County, Arizona, on December 13, 1962, against MGM in which he alleged that on April 9, 1962, while in the employ of MGM in the capacity of a "stunt man" in the production of a motion picture "How the West Was Won," being filmed in part in Maricopa County, petitioner was injured through negligence of MGM, and suffered severe injuries as a result of said negligence. On April 30, 1964, MGM, through its attorneys, filed a motion to dismiss under Rule 12, Arizona Rules of Civil Procedure, claiming that the court lacked jurisdiction over the subject matter of the claim for relief, and sought an order setting this motion for preliminary hearing to the court. Respondent ordered the preliminary hearing on the motion to dismiss by minute entry of May 19, 1964. Petitioner filed with this court a petition for writ of certiorari on June 4, 1964, seeking relief from the order of respondent granting a preliminary hearing on MGM's motion to dismiss for lack of jurisdiction over the subject matter, on the grounds that petitioner was entitled to a jury trial. We denied this petition by order of June 9, 1964.

After a hearing lasting four days, respondent took the motion under advisement, and advised counsel that he was declining to rule upon the jurisdictional questions in advance of trial, and that the jury trial on the issue of common law negligence and damages would proceed. MGM then filed a petition for a writ of mandamus with this court. We granted a peremptory writ on June 17, 1964, which commanded respondent:

> ". . . forthwith to rule on the matter of jurisdiction of said court in the above-entitled matter before proceeding to trial."

By order of June 17, 1964, respondent granted MGM's motion to dismiss for lack of jurisdiction, and in his findings of fact and conclusions of law respondent found that petitioner's exclusive remedy was vested either in the Industrial Accident Commission

of the State of California, or The Industrial Commission of Arizona, and:

> "By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefore the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant."

The judgment of dismissal for lack of jurisdiction was filed on January 5, 1965. Petitioner filed his notice of appeal on February 26, 1965, but the appeal was not perfected by filing within sixty days a bond for costs as required under Rule 73(b), Arizona Rules of Civil Procedure, as amended 1961.

Petitioner then filed a petition for writ of certiorari with the Court of Appeals of Arizona, Division one, which was denied.

The petition was then presented to this court, and we granted the writ of certiorari for the purpose of passing upon the question of whether the petitioner was entitled to a trial by jury on the question of whether he had made an election to receive compensation under the Workmen's Compensation Act. It is the contention of the petitioner that the trial court erred in denying a jury trial. This court is committed to the rule that a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial. State v. Pressley, 74 Ariz. 412, 250 P. 2d 992.

If petitioner was covered by workmen's compensation, then his compensation would be determined by The Industrial Commission of Arizona, and the superior court would not have jurisdiction to try the issues presented; therefore, under the procedure that has been followed in this state for some fourteen years, the court must first determine whether it has jurisdiction before trying a case.

In State v. Pressley, supra, we held the question of election to take under the workmen's compensation statute is a preliminary question to be decided by the trial court prior to trial:

> "Is the trial court the proper tribunal to determine whether Pressley has made an election? The answer is Yes. Next, is it

the duty of the trial judge or the jury to decide that question? The answer: the trial judge should decide that question as a matter of law.

* * *

"In Taylor v. Hubbell, supra [188 F. 2d at page 109], the court held that the question of election was one of law for the trial judge to decide, and said this:

" 'It is axiomatic that "Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist." [Cases cited.] Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were "not in the same employ" and if plaintiff had not made an election under the statute to take compensation. S. H. Kress & Co. v. Superior Court, supra, 66 Ariz. 67, 182 P.2d 931. Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury . . . .'

"Wright on Subrogation, supra, page 79, section 36, says:

" 'The authority of the employer, insurer or assignee to prosecute a cause of action under the subrogation statute has been held to be a preliminary question of law to be heard and determined by the trial judge and not an essential part of the plaintiff's cause triable by the jury.'

* * *

"To recapitulate, we affirm the second Pressley case in all respects. We further order, the alternative writ of mandamus heretofore issued be made preemptory and the commission be allowed to intervene; that the commission be allowed subrogation to any and all of Pressley's rights against the third party for payments made for 'accident benefits' received by Pressley; and that the trial judge hear and decide the question of election as a matter of law before proceeding with the trial of the case on its merits." 74 Ariz. at 415, 417, 422; 250 P. 2d at 995, 996, 999

See also State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P. 2d 1001.

In the Pressley case, supra, we followed the general rule, as stated in 20 Am. Jur. 2d, Courts, § 92:

"§ 92. Power and duty to determine jurisdiction.

"A court has the power and duty to examine and to determine

whether it has jurisdiction of a matter presented to it, its determination being subject, of course, to appellate review. This question should be considered by the court before it looks at other matters involved in the case, and before determining whether the parties are entitled to a jury trial if the court has jurisdiction of the case . . . ." 20 Am. Jur. 2d at 453

The rules is also set forth in 21 C.J.S., Courts, § 113, as follows:

"§ 113. Power of Court to Determine Its Own Jurisdiction
"Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction. The court necessarily decides that it has jurisdiction by proceeding in the cause.

"When at any time or in any manner it is represented to the court that it has not jurisdiction, the court should examine the grounds of its jurisdiction before proceeding further, the question of jurisdiction being always open for determination. The court may receive testimony on a preliminary question to determine its jurisdiction, and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment." 21 C.J.S. at 174, 175

In the case of Burgess v. Gibbs, 262 N.C. 462, 137 S.E. 2d 806, the court said:

"Among other defenses, the answer of the defendant alleges as a plea in bar to plaintiff's action his immunity to suit at common law by plaintiff in this case and his nonliability under the provisions of G.S. § 97-9 and G.S. § 97-10.1 of the N.C. Workmen's Compensation Act.

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity. High v. Pearce, 220 N.C. 266, 17 S.E. 2d 108. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. In re Davis v. Custody, 248 N.C. 423, 103 S.E. 2d 503. 'This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. * * * So, *ex necessitate,* the court may, on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is

apparent, stop the proceeding.' Branch v. Houston, 44 N. C. 85

"When the trial judge in the absence of the jury heard and decided all questions relating to the court's jurisdiction to entertain the instant action, he followed the sound rule that every court necessarily has inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction. [Cases cited.]

"In Bridges v. Wyandotte Worsted Co., supra, [243 S.C. 1, 132 S.E. 2d 18], the Court said:

" 'The issue of jurisdiction is basically one of law. It involves the determination by the court of its right to proceed with the litigation. A decision of this question by the court deprives a litigant of no right to a jury trial of the issue of liability because, if the court has no jurisdiction, the litigants have no rights which they may assert in that court. The right to have a jury pass upon the controverted factual issues must of necessity relate to the assertion of the right of the litigant which has been allegedly violated, which presupposes a court having jurisdiction to grant the relief sought. The determination of the jurisdictional question by the court is not a denial of any constitutional right of a litigant to a jury trial, but simply a determination of the forum in which those rights may properly be asserted. The decision of the question of whether the court has jurisdiction is a preliminary one to the determination of the merits of the cause, and is for the court to decide.' " 137 S.E. 2d at 807, 808

In Adams v. Davison-Paxon Company, 230 S.C. 532, 96 S.E. 2d 566, the court stated the same rule:

"It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the court, which includes the finding of the facts which relate to jurisdiction. [Cases cited.]

"Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether Emporium was performing a part of the 'trade, business or occupation' of the department store-appellant and, therefore, whether respondent's remedy is exclusively under the Workmen's Compensation Law . . ." 96 S.E. 2d at 571, 572

Petitioner relies most heavily on the case of Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 2 L.Ed. 2d 953, 78 S. Ct. 893, in which the Supreme Court of the United States refused to follow the procedure of the state court in South Carolina; however, in doing so, it recognized a distinction in the procedure in the federal courts and that in the state courts—which distinction is specifically applicable in the State of Arizona.

The Court stated:

> "We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow, cf. Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079, 65 S.Ct. 1464, 160 A.L.R. 1231, supra, or even the strong possibility that this would be the case, cf. Bernhardt v. Polygraphic Co. of America, Inc. 350 U. S. 198, 100 L. Ed. 199, 76 S. Ct. 273, supra. There are factors present here which might reduce that possibility. The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disrupted factual issues to yield to the state rule in the interest of uniformity of outcome." 2 L. Ed. 2d at 963, 964

We would also call attention to the fact that this was not a unanimous opinion, and the dissenting opinion, as stated by Justice Whittaker, succinctly states why we should not depart from Pressley, supra.

> "It thus seems to be settled under the South Carolina Workmen's Compensation Law, and the decisions of the highest court of that State construing it, that the question whether exclusive jurisdiction, in cases like this, is vested in its Industrial Commission or in its courts of general jurisdiction is one for decision by the court, not by a jury. The Federal District Court, in this diversity case, is bound to follow the substantive South Carolina law that would be applied if the trial were to be held in a South Carolina court, in which State the Federal District Court sits. Erie R. Co. v. Tompkins, 304

U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487 . . .

* * *

". . . [W]e are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, *the forms and mode of enforcing the right* may at times, naturally enough, vary because the two judicial systems are not identic . . ." 2 L.Ed. 2d at 968, 969

Justice Whittaker does not follow the reasoning of the majority in holding that the difference in the procedures allowing the "judges of many States to comment on the weight of evidence and credibility of witnesses, etc.," as sufficient safeguard against affecting the substantial rights of the parties.

Petitioner has also cited a number of Arizona cases which he contends supports his position, which were decided prior to our decision in Pressley, supra. We do not deem it necessary to comment on these cases, for the members of the court were aware of them at the time of the decision in Pressley. We also call attention to the fact that such cases as Boyden v. Lamb, 152 Mass. 416, 25 N.E. 609 (1890), and Coghlan v. White, 236 Mass. 165, 128 N.E. 33 (1920), dealt with a waiver of the right to bring court damages after electing to receive compensation. In a more recent case, Nealon v. Sullivan, 334 Mass. 213, 134 N.E. 2d 886 (1956), the Massachusetts court, in determining the question of whether an election in a workmen's compensation case should be decided by the judge or the jury, the court stated:

". . . If having accepted compensation he prosecutes an action at law against such other person, a preliminary question is presented to the court whether such action was authorized. This question is to be decided by the judge. (Citing cases)" 134 N.E. 2d at 889

State v. Pressley was decided after mature consideration. Such a case should not be overruled unless it is required by impelling reasons. We find no such reasons to permit the question of jurisdiction to be submitted to a jury in the trial of the case on the merits which might well result in a two or three week trial in a

case where the court would have to direct a verdict in favor of a defendant under the evidence. We do not feel that the rule (Rule 42(b) Arizona Rules of Civil Procedure, 16 A.R.S., as amended 1966) permitting the court to order a separate trial on the question of jurisdiction would be sufficient to overcome this objection, in that it would require delay and determination by the court as to whether the facts in each case would justify such a separate trial. We have held—in State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P.2d 1001—that the Industrial Commission has a right to intervene in a question of jurisdiction. Such an intervention might also result in confusion, if the question of jurisdiction were decided by the jury.

Petitioner also contends that the court erred in that the facts did not support the court's holding that it did not have jurisdiction. One of the grounds given by the court below in so holding was that petitioner had made a waiver under § 23-1024. The court stated:

> "The plaintiff, by making a claim for Workmen's Compensation benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer."

This conclusion of the court was supported by its findings of facts:

> "29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.
>
> "30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

"31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availablity of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

"32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled "Workman's Report of Injuries and Application for Benefits'."

The court went on to find that claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon the propriety or the timelessness of the filing of the writ of certiorari after the time for appeal has expired.

Judgment affirmed.

ERNEST W. McFARLAND, Vice Chief Justice

CONCURRING:

JESSE A. UDALL, Justice

LORNA E. LOCKWOOD, Justice

STRUCKMEYER, Justice, dissenting.

The majority, in reaffirming the holding in State v. Pressley, 74 Ariz. 412, 250 P.2d 992, have compounded the error initiated by the language used in S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 Pac. 931 (1947). The error now results in denying petitioner the right to trial by jury guaranteed by Article 2, § 23 of the Constitution of this state.

PETITIONER'S RIGHT TO SUE

By Article 18, § 6 of the Constitution of Arizona, adopted at statehood in 1912, employees were guaranteed a right of action to recover damages for personal injuries suffered during the course of employment.

> "The right of action to recover damages for injuries shall never be abrogated, * * * ." Art. 18, § 6, Const. of Arizona.

Of Article 18, § 6, we said:

> "Taken into consideration with the preceding sections 4 and 5, it is beyond question that the 'right of action to recover damages for injuries . . . ' therein mentioned is the common-law action of negligence, * * * ." Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 443, 242 Pac. 658.

We also said:

> "It is urged that this provision makes the former common-law action for negligence a constitutional one, and that it cannot be abrogated by the legislature. We think there is no question that this proposition, stated in the abstract, is correct." Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 420, 300 Pac. 958.

Thereafter, the people of Arizona, in 1925, amended the Constitution to provide for a workmen's compensation law.

> "The legislature shall enact a Workmen's Compensation Law * * * by which compensation shall be required to be paid to any such workman in case of his injury * * * ; provided that it shall be optional with any employee engaged in such private employment to settle for such compensation, or to retain the right to sue said employer as provided by this Constitution; * * * ." Art. 18, § 8, Const. of Arizona.

This amendment gives an employee alternative remedies where the employee has received personal injuries. He has the option to

bring suit against those responsible for his injuries or to take the benefits conferred by workmen's compensation. It does not restrict the right of action to recover damages; it simply gives an injured workman an additional remedy, the right to take compensation if he so chooses.

The legislature did enact a workmen's compensation law. It recognized and reinforced the plain language of the Constitution by providing that it would be optional with an employee as to whether he accepted compensation or retained the right to sue the employer. Laws of 1925, Ch. 83, § 60, now A.R.S. § 23-906, subsec. A.[1] By subsections B, C, D and E of § 23-906,[2] the legis-

[1] "A. Employers who comply with the provisions of § 23-961 as to securing compensation shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law."

[2] "B. The employee's election to reject the provisions of this chapter shall be made by a notice in writing, signed and dated by him and given to his employer, in duplicate in substantially the following form:
'To (name of employer):

You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto.'

"C. The notice shall be filed with the employer prior to injuries sustained by the employee, and thereafter within five days the employer shall file with the commission the duplicate of the notice so served by the employee. All employees shall be conclusively presumed to have elected to compensation in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.

"D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form:

'All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of such law, and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that

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lature provided the circumstances by which the employee signified his acceptance of the election to take compensation, thus waiving the right to sue guaranteed by Article 18, § 6.

It will be noticed that in subsection B the statute uses the word "election" and in subsections C and D "elected". This election is an election of remedies.

> "An election of remedies has been defined as the act of choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The phrase is also used in a more restrictive sense to denote the doctrine that the adoption, by an unequivocal act, of one or two or more inconsistent remedial rights has the effect of precluding a resort to the others." 25 Am.Jur.2d, Election of Remedies, p. 646.

"An election of remedies is an affirmative defense. It must be pleaded by the party who asserts it and the burden of proof is on him to establish it." Kuhl v. Hayes, 212 F.2d 37. And see Bagwell v. Susman, 165 F.2d 412.

> "But, apart from that, it is not the plaintiff's burden to prove that his action is outside the scope of the Workmen's Compensation Act, N.J.S.A. 34:15-1. Compare Butler v. Eberstadt, 113 N.J.L. 569, 175 A. 159. That would be a matter of defense to be advanced by the defendant." Dailey v. Mutual Chemical Co. of America, 125 N.J.L. 465, 16 A.2d 557, Aff'd. 126 N.J.L. 426, 19 A.2d 778.

As an affirmative defense, an election of remedies cannot be raised by a motion to dismiss as was done in the instant case. Macias v. Klein, 106 Fed.Supp. 107; Southern Farmers Asso. v.

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blanks and forms for such notice are available to all employees at the office of this company.'

"E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer."

Wyatt, 234 Ark. 649; 353 S.W.2d 531; Household Finance Corp. v. Suhr, 44 Ill.App.2d 292; Vitarelli v. Brunson Const. Corp., 235 App.Div. 804, 256 N.Y.S. 637; Hanover Estates, Inc. v. Finkelstein, 194 Misc. 755, 86 N.Y.S.2d 316; Saso v. State, 20 Misc.2d 826, 194 N.Y.S.2d 789; New Hanover County v. Sidbury, 225 N.C. 679, 36 S.E.2d 242.

The choice, denominated an election by the statute, is essentially a waiver of the right of action to recover damages for injuries guaranteed to petitioner by Article 18, § 6 of the Constitution. The essence of a waiver is that there be an opportunity of choice between the relinquishment and the enforcement of a right. Arizona Title Guaranty & Trust Co. v. Modern Homes, 84 Ariz. 399, 330 P.2d 113. It is the intentional relinquishment of a known right. Murphey v. Valenzuela, 95 Ariz. 30, 386 P.2d 78; City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411; In re Brandt's Estate, 67 Ariz. 42, 190 P.2d 497; Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224; Southwest Cotton Co. v. Valley Bank, 26 Ariz. 559, 227 Pac. 986.

Waiver must be pleaded affirmatively.

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, *waiver,* and any other matter constituting an avoidance or affirmative defense. * * *" Rule 8(d), Rules of Civil Procedure, 16 A.R.S. (Emphasis supplied.)

And see Allstate Insurance Co. v. Moldenbauer, 193 F.2d 663; Western Casualty and Surety Co. v. Beverforden, 93 F.2d 166; Hunter Milling Co. v. Koch, 82 F.2d 735.

The burden of proving waiver is upon the party claiming or asserting it. Cowles v. Ohio Farmers Insurance Co., 242 F.2d 73; Buffum v. Chase National Bank, 192 F.2d 58, cert. denied 342 U.S. 944, 96 L.Ed. 702, 72 S.Ct. 558. Waiver is a question of fact for the jury where the facts are disputed. Cannon v. Travelers Indemnity Co., 314 F.2d 657; Albert v. Joralemon, 271 F.2d 236; Home Indemnity Co. v. Allen, 190 F.2d 490; Ross Engin-

eering Co. v. Pace, 153 F.2d 35. "The cases uniformly hold that questions of waiver are questions of fact to be submitted to the jury." Ross Engineering Co. v. Pace, supra, 153 F.2d 35, 50.

It is, of course, immaterial whether the selection of one or the other of the options provided in the Constitution, Art. 18, § 8, is denominated a waiver or an election of remedies. The result is the same.

> "An employer who contends that he is one of a class of persons protected from an action at law by the Workmen's Compensation Act must plead and prove the conditions necessary to bring himself within the statute. The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute. It is incumbent upon the employer to prove that the Workmen's Compensation Act is a bar to the employee's ordinary remedy." Popejoy v. Hannon, 97 Cal.2d 159, 231 P.2d 484.

At this point it might be well to summarize: One, the Constitution, by Article 18, § 6, gives petitioner a right of action to recover damages for his personal injuries — a right which "shall never be abrogated." Two, the subsequent amendment, Article 18, § 8, gives him an additional right, that is, a choice between the right to sue or to take compensation without suit. Three, the legislative enactment, § 23-906, since it can neither augment nor diminish the right to sue granted by the Constitution, simply provides the time when and method by which the election or waiver of that right is evidenced. And four, the assertion of an election or waiver by the employer is an affirmative defense not to be determined on motion, but as any other contested factual issue.

PETITIONER'S RIGHT TO TRIAL BY JURY

By the Constitution, Article 2, § 23, the people of this state have provided:

> "The right of trial by jury shall remain inviolate, * * *."

We have said repeatedly that the Constitution does not give the right to trial by jury, but its purpose is to guarantee a preservation of the right. Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479; State v. Cousins, 97 Ariz. 105, 397 P.2d 217; Brown

v. Greer, 16 Ariz. 215; 141 Pac. 841. Since the Constitution preserves a jury trial in the common-law action of negligence, Alabam's Freight Co. v. Hunt, 29 Ariz. 419, supra, it would seem beyond the possibility of quibbling that Morgan should have had a jury trial on Metro-Goldwyn-Mayer's affirmative defense that he elected to take under the Workmen's Compensation Act, thereby waiving his common-law action.

> "It is fundamental that the California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850. * * * The legislature may not, directly, or in the guise of procedural changes or changes in remedy, deprive a litigant of a jury in a case formerly triable at law. People v. Kelly, 203 Cal. 128, 133, 263 P. 226. People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 299, 231 P.2d 832." Ripling v. Superior Court, 112 Cal.App.2d 399, 247 P.2d 117.

How is it, then, that the majority of this Court now concludes, in the face of such plain, unequivocal, constitutional language that the question of petitioner's waiver of his constitutional right of action is to be determined by the trial judge?

The words of Justice Frankfurter, in his dissent to Yonkers v. United States, 320 U.S. 685, 695, 88 L.Ed. 400, 64 S.Ct. 327, capsulizes the problem here:

> "'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls."

We have here a simple case in which the petitioner is seeking to exercise his constitutional right but the majority persist in talking about "jurisdiction".

The Arizona Constitution, Article 18, § 6, speaks of the "'right of action' to recover damages." The right to bring suit to obtain the relief sought is a "right of action." It is the right to pursue a remedy.

> "At the risk of being elementary, it is well to define certain terms — the more so as they have been, at times, a source of confusion. The right of action is merely the right to pursue a remedy." Yankwich, J., in United States v. Standard Oil Co. of Calif., 21 Fed.Supp. 645, 660.

And see Adams v. Albany, 80 Fed.Supp. 876; Foster v. Humburg,

180 Kans. 64, 299 P.2d 46; Douglas v. Daniels Bro. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195, 125 A.L.R. 761; Landry v. Acme Flour Mills, 202 Okla. 170, 211 P.2d 512; Eastside etc. Co. v. Southeast Portland Lumber Co., 155 Ore. 367, 64 P.2d 625; Elmo v. Gaines (Tex.), 282 S.W. 835; Seymour v. Richardson, 194 Va. 709, 75 S.E.2d 77.

The statute does not confuse "jurisdiction" with the "right to pursue a remedy."

> "The right to recover compensation pursuant to the provisions of this chapter for injury sustained by an employee shall be the exclusive *remedy* against the employer, except as provided by §§ 23-906 * * *." A.R.S. § 23-1022. (Emphasis supplied.)

It says the right to recover compensation shall be the remedy.

The error in confusing jurisdiction with the petitioner's right to pursue a remedy in the superior court originated in S. H. Kress Co. v. Superior Court, 66 Ariz. 67, 182 P.2d 931. There, a suit was brought by a minor, age thirteen, against the Kress Company for his personal injuries. The Kress Company brought a writ of prohibition in this Court. In the course of the decision holding that a minor could make a valid election, the Court said:

> "* * * it is the prime contention of the respondent that in light of the constitutional provision heretofore quoted, the child labor laws of our state and sections of our Workmen's Compensation Law that the child involved in this case was not sui juris to make a binding election before injury so as to make the Workmen's Compensation Act his exclusive remedy, and the writ of prohibition in this case should not issue since the Superior Court has jurisdiction to hear this case."

It then said this:

> "Statutes direct that the Superior Court has no jurisdiction to hear this case if the injured boy's exclusive remedy is under the Workmen's Compensation Act, for the right to appeal is by statute only * * * and the only appeal given from an award of the Commission is by Sec. 56-972, A.C.A. 1939: * * *." 66 Ariz. at 72.

This latter statement is palpably a non sequitur. The right to appeal from an award of the Industrial Commission is, of course,

given by statute exclusively to the Supreme Court; but respondent, as plaintiff in the superior court, was not attempting to appeal an award of the Commission. He was seeking to invoke a right of action guaranteed by the Constitution of Arizona, Article 18, § 6, supra. The Industrial Commission, by processing the claim under legislative acts, could not oust the jurisdiction granted to the superior court by Article 6, § 14 of the Constitution of Arizona to hear and determine respondent's case.

"Jurisdiction is the power to decide a case on its merits." Sil-flo Corp. v. Bowen, 98 Ariz. 77, 402 P.2d 22. It is not dependent upon the unsuccessful assertion of a defense such as accord and satisfaction, contributory negligence, estoppel, failure of consideration, fraud, laches, release, limitation of actions, waiver or election. These are defensive matters which, if found to be true, would defeat recovery on a plaintiff's right of action. It would be an absurdity, to which this Court would not for one moment listen, were it urged, for example, that contributory negligence, fraud, estoppel or laches could be raised by a motion to dismiss and decided by the trial judge without submission to a jury by the occult device of labeling the issue "jurisdictional".

In March, 1951, the United States Court of Appeals, Ninth Circuit, decided Taylor v. Hubbell, 188 F.2d 106. There, it seized upon the language of the Kress case, saying:

> "* * * And where allowance by the commission is the exclusive remedy of an injured workman the Arizona courts have 'no jurisdiction to hear' an action for damages. S. H. Kress & Co. v. Superior Court, 1947, 66 Ariz. 67, 182 P.2d 931, 934." 188 F.2d at 108

and concluded:

> "Being jurisdictional, these issues [as to whether there had been an election] were triable to the court not to the jury." 188 F.2d at 109.

This error was perpetuated the following year in State ex rel. Industrial Commission v. Pressley, Nov. 1952, 74 Ariz. 412, 250 P.2d 992, wherein this Court quoted from and followed Taylor v. Hubbell without serious analysis.

Palpably, there is here no question of jurisdiction. The matter is as simple as this: If the jury determines the election against the plaintiff in the superior court, judgment should be entered in defendant's favor. The determination of whether the exclusive remedy is in the Commission is just another factual issue to be decided as all factual issues have been decided from time immemorial under the Anglo-American jury system.

I cannot acquiesce in this Court's disposition of the case. The language of the Kress decision, misapplied in Pressley and now stubbornly adhered to, whittles away at one of the most valuable of constitutional rights so that now a workman of this state may not have a jury resolve this dispute with his employer.

I dissent.

FRED C. STRUCKMEYER, JR., Justice

I concur in the dissent.

CHARLES C. BERNSTEIN, Chief Justice

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 454

ROBERT D. MORGAN,

Petitioner,

v.

JACK D. H. HAYS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, AND SAID SUPERIOR COURT,

and

METRO-GOLDWYN-MAYER, INC.,

a Delaware corporation,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at ____ Ariz. ____, 426 P.2d 647 (1967).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether this Court should overrule almost a century of decisions of this Court and numerous other federal and state courts, and require the states to furnish jury trials conforming to the federal model in all civil cases involving more than $20.00.

STATEMENT OF THE CASE

The Petitioner, Robert D. Morgan, was injured on April 9, 1962, while working for the Respondent and Real Party in Interest, Metro-Goldwyn-Mayer, Inc. (MGM), as a stunt man in the filming of the movie, "How The West Was Won." MGM had its employees covered by Workmen's Compensation insurance, both in the State of Arizona and in the State of California, during the entire time that Petitioner was employed by MGM.

After the accident, while he was in the hospital, and while he was lucid and responsive, Petitioner sought and obtained the legal advice of a prominent Phoenix law firm, Snell & Wilmer. After consulting with two lawyers of that firm and receiving an opinion from them that he should apply for and accept Workmen's Compensation, Petitioner executed or caused the execution of a "Workmen's Report of Injury and Application for Benefits," a form report supplied by the Arizona Industrial Commission. From May 23 through December 2, 1962, Petitioner filed, also on Industrial Commission forms, fourteen different documents entitled "Workmen's Supplemental Claim for Compensation"; he understood that these were claims for Workmen's Compensation. Pursuant to each of these claims, Petitioner received and accepted Workmen's Compensation payments.

On December 13, 1962, after consulting with other counsel, Petitioner filed the instant lawsuit against his employer based upon alleged common law negligence. After the lawsuit was filed, he accepted, endorsed, and cashed an additional check for Workmen's Compensation benefits.

MGM filed a Motion to Dismiss Petitioner's Complaint on the ground that, by virtue of Arizona's Workmen's Compensation law, the Superior Court lacked jurisdiction to entertain the negligence action. Pursuant to the Arizona rule that "a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial,"[1] the Respondent Judge Hays, to whom the case had been assigned, held a hearing which lasted for four days, on the question whether under the State Workmen's Compensation Act Petitioner was precluded from bringing a common law negligence suit against his employer. On the basis of evidence presented at the hearing, Judge Hays concluded that because Morgan was covered by and had accepted Workmen's Compensation benefits, exclusive jurisdiction over his claim lay in the Arizona State Industrial Commission. Judge Hays' careful and detailed findings of fact and conclusions of law are set forth in the Appendix to this Brief.

Judge Hays' ruling was affirmed by the Arizona Supreme Court, reviewing the case by Writ of Certiorari. As is the case with his Petition for Certiorari filed with this Court, Petitioner's Brief before the Arizona Supreme Court was devoted almost exclusively to issues of state law. The Arizona Court, both the majority and the dissent, dealt solely with state law problems.

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[1]Lower Court opinion; Pet. App., p. 16.

REASONS FOR DENYING THE WRIT

The great bulk of the Petition for Certiorari is devoted to questions of state law. The only possible federal issue—whether Petitioner had a federal right to a jury trial on the question of whether, under the Arizona Workmen's Compensation law, he was precluded from bringing a common law action against his employer—is blandly assumed by Petitioner without argument.

The Petition for Writ of Certiorari should be denied for two separate and independently sufficient reasons:

(1) This Court and all other Courts which have considered the problem have consistently and unanimously held that the allocation of functions between judge and jury in state court proceedings is a matter of state law, unaffected by the Seventh and Fourteenth Amendments to the United States Constitution. These holdings have been reaffirmed by this Court as recently as 1958 and by other courts even more recently.

(2) If there is to be a re-examination of the long line of cases holding that the Seventh Amendment is not binding upon the states through the Fourteenth, this is neither the time nor the case in which to do it.

I

This Court in *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893 (1958), held that in diversity of citizenship suits brought in Federal District Courts, questions of fact related to whether state Workmen's Compensation laws operate as a bar to common law negligence actions are jury questions. This Court did not pass on the question whether the rule which it laid down in the *Byrd* case was of constitutional dimension.[2]

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[2]Footnote 10 of the Court's opinion states as follows:

> Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action. 356 U.S. at 537, 78 S.Ct. at 901, n.10.

Assuming, *arguendo*, for purposes of this Brief, that the *Byrd* holding does have constitutional underpinnings,[3] there has been no invasion of Petitioner's constitutional rights in this case; this Court has repeatedly held that the Seventh Amendment is not binding upon the States, as disclosed by the following cases:

Edwards v. Elliott, 21 Wall. 532, 22 L.Ed. 487 (1874)

Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1876)

Pearson v. Yewdall, 95 U.S. 294, 24 L.Ed. 436 (1877)

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St. Louis & Kansas City Land Co. v. Kansas City, 241 U.S. 419, 36 S.Ct. 647 (1916)

Chesapeake & Ohio Ry. Co. v. Gainey, 241 U.S. 494, 36 S.Ct. 633 (1916)

Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260 (1917)

New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247 (1917)

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[3]The fact that the issue was left undecided in *Byrd* is an additional reason why, as developed more fully in Section II of this Brief, this is not an appropriate case to consider the relationship between the Seventh and Fourteenth Amendments.

Hawkins v. Bleakly, 243 U.S. 210, 37 S.Ct. 255 (1917)

Wear v. State of Kansas, 245 U.S. 154, 38 S.Ct. 55 (1917)

Chicago, R. I. & P. R. Co. v. Ward, 252 U.S. 18, 40 S.Ct. 275 (1920)

Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226, 43 S.Ct. 589 (1923)

Southern Ry. Co. v. City of Durham, 266 U.S. 178, 45 S.Ct. 51 (1924)

Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299 (1930)

These holdings have been as emphatic as they have been numerous. In *Minneapolis & St. L. R. Co. v. Bombolis, supra,* the Court stated as follows:

> Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. * * * [Citing Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672, and other cases.] (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U.S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U.S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the

Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that *to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning.* 36 S.Ct. at 596-97. (Emphasis added.)

There is not one single case in any jurisdiction, either federal or state, which we have been able to find, which has either held or even suggested that the provisions of the Seventh Amendment have been "absorbed" into the Fourteenth. On the contrary, in addition to the United States Supreme Court authorities cited above, there are numerous jurisdictions, both federal and state, which have held that issues of jury trial in state civil cases are within the exclusive domain of the states.[4] Several of these de-

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[4]ALABAMA—*Ex parte Homewood Dairy Products Co.*, 241 Ala. 470, 3 So. 2d 58 (1941); *Kraas v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565 (1935); COLORADO—*Parker v. McGinty*, 77 Colo. 458, 239 Pac. 10 (1925); CONNECTICUT—*Gray v. Mossman*, 91 Conn. 430, 99 Atl. 1062 (1917); FLORIDA—*Ruth v. Sorensen*, 104 So. 2d 10 (Fla. 1958); *Florida East Coast Ry. Co. v. Hayes*, 67 Fla. 101, 64 So. 504 (1914); GEORGIA—*Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961); INDIANA—*Hayworth v. Bromwell*, 158 N.E.2d 285 (1959); IOWA—*Gatton v. Chicago, R. I. & P. Ry. Co.*, 95 Iowa 112, 63 N.W. 589 (1895); KENTUCKY—*Drury v. Franke*, 247 Ky. 758, 57 S.W.2d 969 (1933); LOUISIANA—*Fontenot v. Marquette Cas. Co.*, 161 So. 2d 467 (La. App. 1963); MASSACHUSETTS—*Bothwell v. Boston Elevated Ry. Co.*, 215 Mass. 467, 102 N.E. 665 (1913); MISSISSIPPI—*Gulf & S. I. R. Co. v. Hales*, 140 Miss. 829, 105 So. 458 (1925); MISSOURI—*Irwin v. Globe-Democrat Pub. Co.*, 368 S.W.2d 452 (Mo. 1963); MONTANA—*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554 (1911); NEW YORK—*Middleton v. Whitridge*, 213 N.Y. 499, 108 N.E. 192 (1915); OKLAHOMA—*Adams v. Iten Biscuit Co.*, 63 Okl. 52, 162 Pac. 938 (1917); *St. Louis & S. F. R. Co. v. Brown*, 45 Okl. 143, 144 Pac. 1075 (1914), *aff'd*, 241 U.S. 223, 36 S.Ct. 602; RHODE ISLAND—*In re Condemnation of Certain Land for New State House*, 19 R.I. 326, 33 Atl. 448 (1895); TEXAS—*White v. White*, 183 S.W. 369 (Tex. Civ. App. 1916); VERMONT—*Parizo v. Wilson*, 101 Vt. 514, 144 Atl. 856 (1929); *Hall v. Armstrong*, 65 Vt.

FOOTNOTE CONTINUED ON NEXT PAGE

cisions have been handed down in comparatively recent times.[5]

This Court also recognized the principle in *Byrd v. Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893 (1958). At issue in *Byrd*, a diversity of citizenship case brought in the District Court for the Western District of South Carolina, was whether the South Carolina Workmen's Compensation Act acted as a bar to the bringing of a suit by Mr. Byrd against his employer. Under the law of South Carolina, as under the law of Arizona and many other states,[6] such questions are questions for the Court. This Court in *Byrd* declared the federal rule to be otherwise. The question was thus squarely raised whether in federal diversity cases the division of function between judge and jury so affects the "outcome" of the dispute as to require application of state

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424, 26 Atl. 592 (1893); WASHINGTON—*Donaldson v. Great Northern Ry. Co.*, 89 Wash. 161, 154 Pac. 133 (1916), *aff'd*, 246 U.S. 121, 38 S.Ct. 230; *State of Washington v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645 (1913), *aff'd*, 243 U.S. 219, 37 S.Ct. 260 WISCONSIN—*Richie v. Badger State Mut. Cas. Co.*, 22 Wis.2d 133, 125 N.W.2d 381 (1963). And see the following lower federal court cases: *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963); *O'Donnell v. Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill. 1960); *Blass v. Weigel*, 85 F. Supp. 775 (D.C. N.J. 1949); *New Jersey Chiropractic Ass'n. v. State Board*, 79 F. Supp. 327; (D.C. N.J. 1948); *Gibson v. Bellingham & N. Ry. Co.*, 213 Fed. 488 (W.D. Wash. 1914).

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[5]See, *e.g.*, *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963); *Fontenot v. Marquette Cas. Co.* 161 So. 2d 467 (La App. 1963); *Irwin v. Globe-Democrat Publ. Co.*, 368 S.W.2d 452 (Mo. 1963); *Richie v. Badger State Mut. Cas. Co.*, 22 Wis.2d 133, 125 N.W.2d 381 (1963); *Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961) and *O'Donnell v. Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill. 1960).

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[6]See *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 96 S.E.2d 566 (1957); *Dolese Bros. v. Tollett*, 162 Okl. 158, 19 P.2d 570 (1933); *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Vescio v. Pennsylvania Electric Co.*, 9 A.2d 546 (Pa. 1939); *Freire v. Matson Nav. Co.*, 109 P.2d 1022 (Cal. App. 1941).

rather than federal law under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938) and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945).[7]

This Court held that the South Carolina rule did not so affect the outcome as to be required under *Erie* and *York*. The implicit assumption underlying not only the holding, but also the entire approach in *Byrd* was that the state rule involved there—the same as the Arizona rule at issue here—contravened no federal constitutional principle. This premise was in fact expressly announced at one point, the Court stating: "A State may, of course, distribute the functions of its judicial machinery as it sees fit." 356 U.S. at 536, 78 S.Ct. at 900.

Nor can it be inferred that since many of the provisions of the first eight amendments in recent years have been held "absorbed" into the due process clause of the Fourteenth Amendment,[8] that all of the provisions of the first eight amendments are, or should be, binding upon the States.

The relevant inquiry, at least since *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937), is whether the particular provision under consideration rises to such dignity that it can be characterized as "of the very essence of a scheme of ordered liberty." 302 U.S. at 325, 58 S.Ct. at 152. The suggestion that all of the provisions of the first eight amendments have been

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[7]The Court stated the issue as follows:

> Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another in the state court. 356 U.S. at 538, 78 S.Ct. at 901.

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[8]*Klopfer v. North Carolina*, ___ U.S. ___, 87 S.Ct. 988 (1967); *Washington v. Texas*, ___ U.S. ___, 87 S.Ct. 1920 (1967); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Gideon v. Wainright*, 372 U.S. 335, 83 S.Ct. 792 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

"incorporated" into the Fourteenth and are therefore binding upon the States has never commanded a majority in this Court.[9] Recent cases extending the coverage of the Fourteenth Amendment have all followed the traditional approach set forth in *Palko v. Connecticut*, that only those provisions which are of such magnitude that they can be said to be "implicit in the concept of ordered liberty" are binding upon the states. See, *e.g., Klopfer v. North Carolina*, ___ U.S. ___, 87 S.Ct. 988, 993 (1967) (characterizing the right to speedy trial as one which "has its roots at the very foundation of our English law heritage"); *Washington v. State of Texas*, ___ U.S. ___, 87 S.Ct. 1920, 1922 (1967) (describing the right to compulsory process for attendance of witnesses as "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment"); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 1492 (1964); and *Gideon v. Wainright*, 372 U.S. 335, 343-44, 83 S.Ct. 792, 796 (1963) (holding the privilege against self-incrimination and the right to counsel to be "fundamental right[s] essential to a fair trial").

By its own terms, the Seventh Amendment negates any suggestion that it rises to such a level as to be of the "very essence of a scheme of ordered liberty" or to "have its roots at the very foundation of our English law heritage." Unlike the provisions with which the afore-cited cases dealt, the Seventh Amendment applies only to civil cases. Moreover, there is no other provision in the Bill of Rights which is expressly tied to a specific monetary limitation. The contention that a rule of law which guarantees jury trial in cases involving $20.01 but not in cases involving an even $20.00 could be a right which is "implicit in the concept of ordered liberty" is patently absurd. Such a contention would not only render "fundamental rights essential to a fair

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[9]See *Gideon v. Wainright, supra*, concurring opinion by Mr. Justice Douglas, 372 U.S. at 345, 83 S.Ct. at 797.

trial" dependent upon a difference of one cent, but would also mean that the dimensions of such rights periodically suffer an automatic *pro tanto* diminution commensurate with rises in the cost of living.

Throughout the course of Anglo-American constitutional history thoughful men have drawn a distinction between trial by jury in civil cases and the criminal protections contained in other provisions of the first eight amendments, particularly jury trial in criminal cases. Great Britain, from whom we inherited the jury system, abolished trial by jury in civil cases in 1933, but retained it for criminal cases. Judge Desmond of the New York Court of Appeals has made the following observation:

> There is now no observable movement to restore civil juries in Great Britain and, except in parts of Canada, they are as a practical matter non-existent (completely non-existent in accident cases) in the British Commonwealth and indeed, in every major country except the United States.[10]

Professors Kalven and Zeisel in their recently published book, *The American Jury,* point out that, "most of the unrest over the jury today is limited to its use in civil trials. It is agreed that the case for the jury in criminal trials is different and much stronger."[11]

The Federalist Papers devoted an entire essay, No. 83, to trial by jury, the dominant theme of that essay being the inextricable link between liberty and trial by jury in criminal cases, and the lack of any necessary connection between liberty and trial by jury in civil cases. In the words of *The Federalist:*

> For my own part, the more the operation of the institution [of trial by jury in criminal cases] has fallen under my ob-

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[10]Desmond, *Should it Take Thirty-four Months for a Jury Trial?*, N.Y. Times, Dec. 8, 1963 (Magazine), pp. 29, 74.

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[11]KALVEN and ZEISEL, THE AMERICAN JURY at 9 (1966).

> servation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defence against the oppressions of the hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution and of its friendly aspect to liberty; ***but I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases.*** *The Federalist,* No. 83, at 461-62 (Colonial Press, Rev. Ed.) (Emphasis added.)

The use of liberty as the standard for comparison of trial by jury in civil and criminal cases is especially interesting in light of this Court's test as announced in *Palko v. Connecticut,* inquiring whether a particular provision is "implicit in the concept of ordered liberty", and the further observation in *Palko* that, "if the Fourteenth Amendment has absorbed [particular provisions] the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . ." 302 U.S. at 326 58 S.Ct. at 152.

In an article entitled *"Selective Incorporation" in the Fourteenth Amendment,* 73 YALE L. J. 74 (1963, Professor Louis Henkin extols the virtues of "selective incorporation," one of whose principal advantages, according to Professor Henkin, is the following:

> And since it does not involve automatic absorption of the whole of the Bill of Rights, selective incorporation permits the abandonment, as regards the states, of one or more provisions of the Bill of Rights that seem less important and would be too onerous—***say, that dated provision in the seventh amendment requiring a jury trial in civil cases where the value in controversy exceeds twenty dollars.*** For the rest, ***selective incorporation could apply to the states all the 'im-***

portant' provisions of the Bill of Rights in their full and growing vigor. (73 YALE L. J. at 76.) (Emphasis added.)

Similarly, Professor Charles Fairman, in an exhaustive article, *Does the Fourteenth Amendment Incorporate The Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949), Concludes that the history of the times surrounding the passage of the first Civil Rights Act and the Fourteenth Amendment, refutes the notion that the Fourteenth Amendment was intended to incorporate all of the Bill of Rights. Professor Fairman observed that if total incorporation had been intended by the Fourteenth Amendment, states whose laws differed significantly from the provisions of the Bill of Rights would have been less ready to ratify. The prime example advanced in support of this aspect of his argument is the Seventh Amendment. Professor Fairman states as follows:

> To make the Seventh Amendment binding upon the states —the very thought of it would have given pause to the state legislatures. Religious liberty, freedom of speech and of the press, the essentials of a fair trial—values such as these seem eternally good and true and one can imagine a legislature accepting a new obligation to observe them. There have been men so attached to the practices of the common law as to place the grand jury among these eternal values, even though by 1866 some states were prosecuting felonies upon information. *But no one could reasonably hold that it was inherent in justice that the states make available a jury of twelve men in any case where more than $20 was involved.* (Recall at this point the gradual decline of the purchasing price of the dollar.) The very fact that the proposed Amendment was so readily accepted by so many legislatures is on its face enough to throw grave doubt on the theory that it incorporated Amendments I to VIII. 2 STAN. L. REV. at 83-84, (Emphasis added.)

The late Mr. Justice Frankfurter, in his *Memorandum on "Incorporation" of the Bill of Rights into the Due Process*

Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965), makes the following observation concerning the original understanding as to the relationship between the Seventh Amendment and the Due Process Clause of the Fourteenth:

> In *Twitchell v. Pennsylvania*, 7 Wall. 321, the Court rejected an argument that the Fifth and Sixth Amendments applied to the States, relying on *Barron v. Baltimore*, 7 Pet. 243, and subsequent cases. In *Justices v. Murray*, 9 Wall. 274, the Court accepted as settled that the Seventh Amendment did not apply to the States. Neither case intimates that anyone even thought of proposing that these amendments had been newly brought to bear on the States by the Fourteenth. Yet the Fourteenth's formulation and adoption had been a subject of great interest, especially to lawyers and judges, only months prior to the decision of these cases. The significance of this contemporaneous understanding need not be labored. 78 HARV. L. REV. at 750 (1965).

II

Even if this Court were to conclude that the scores of cases in this and other Courts unanimously holding that the Seventh Amendment is not binding upon the States should be re-examined, this is neither the time nor the case in which to do it.

A. This Court in *Byrd v. Blue Ridge Electric Cooperative, Inc., supra*, held that the federal rule applicable in diversity cases was dictated by "the influence—if not the command—of the Seventh Amendment. . . ." 356 U.S. at 537, 78 S. Ct. at 901. The Court expressly disclaimed any views upon "the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action." 356 U.S. at 537, 78 S. Ct. at 901, n. 10.

This case raises, therefore, at best, only a peripheral Seventh

Amendment question. If the cases cited above were to be re-examined, it would seem preferable to do so in the context of a case involving issues which lie at the core, rather than the periphery—or perhaps completely outside the ambit—of the Seventh Amendment.[12]

B. The Petition for Certiorari scarcely mentions the federal issue, and is utterly devoid of any analysis or argument concerning it. This almost exclusive devotion to state issues was also characteristic of the Petitioner's briefs before the Arizona Court, and both the majority and the dissenting opinions in the Court below restricted themselves entirely to non-federal issues. As a result, the case comes to this Court without the benefit of the sharpening and refinement of issues which result from a lower court having come to grips with the federal problem and reached a solution.

C. The American jury system, including its underlying conceptual premises, and its strengths and weaknesses as a means of resolving questions of fact, is currently undergoing one of the most careful and intensive studies ever undertaken in any field of law, under the direction of Professors Kalven and Zeisel at the University of Chicago. Two books have already been published.[13] The next volume, dealing with civil jury trials, should be forthcoming within a short time.

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[12]Significant in this regard is the fact that Workmen's Compensation laws—and necessarily, therefore, the extent to which these laws operate as a bar to common law negligence suits—were not known at common law nor at the time the Seventh Amendment was adopted. See *Lewis and Clark County v. Industrial Acc. Board* 52 Mont. 9, 155 Pac. 268 (1916).

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[13]KALVEN and ZEISEL, THE AMERICAN JURY (1966); and ZEISEL, KALVEN and BUCHHOLZ, DELAY IN THE COURTS (1959). In addition, the Jury Project Study has resulted in "some sixty or so articles on various aspects of the jury." KALVEN and ZEISEL, THE AMERICAN JURY at vi.

These studies potentially provide the raw material for some very helpful experimentation by the fifty state judiciaries in our federal system. As Mr. Justice Brandeis observed, "It is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory; and try novel social and economic experiments. . . ." *New State Ice Co. v. Leibmann*, 285 U.S. 262, 280, 311, 52 S. Ct. 371, 375, 386 (1932).

Even assuming that the time may come when the federal standard for civil jury trials should be made binding upon the states, this is manifestly not the time, when our system is just at the threshold of the first serious, systematic inquiry into the fundamental postulates and the practical operations of the jury system. At a very minimum, opportunity should be allowed for attempts by the states to make whatever practical application might be indicated from these forthcoming studies. It would seem a monumental error to freeze for all time the further development and adaptation of the jury system by forcing it into a mold which was cast some 200 years ago. It is conceivable, though barely so, that it could eventually be shown that the right to trial in civil cases by juries which conform to the pattern that existed at common law in all cases involving more than $20.00 is of a fundamental nature. But clearly, such a determination can more appropriately be made after there has been opportunity for interaction between the studies which are presently being conducted and the experimental possibilities which exist within our federal system.

An example which readily comes to mind concerns the number of persons who must serve on a jury. This Court has held that the Seventh Amendment, "has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791." *Dimick v. Schiedt*, 293 U. S. 474, 487, 55 S. Ct. 296, 301 (1935). See also *Dagnello v. Long Island Rail Road Company*, 289 F. 2d 797 (2d Cir. 1961); *Schaefer v. Gunzburg*,

246 F.2d 11 (9th Cir. 1957), *cert. denied* 355 U.S. 831, 78 S.Ct. 45; *Diederich v. American News,* 128 F.2d 144 (10th Cir. 1942). It follows—and has been so held—that the jury required by the Seventh Amendment is a jury composed of twelve persons. *Diederich v. American News, supra.*

The laws of the State of Arizona vest in the Justices of the Peace exclusive jurisdiction over all civil actions involving less than $200.00, and concurrent jurisdiction with the Superior Court over all civil actions involving between $200.00 and $500.00. ARIZ. REV. STAT. ANN. § 22-201 (1964). Arizona statutes further provide that juries in civil cases heard in Justice of the Peace Courts shall be composed of six persons unless the parties consent to try the action with a lesser number, not less than three. ARIZ. REV. STAT. ANN. § 21-103 (1962). This six-person jury system in small claims cases has proven to be a workable and practical accomodation of, on the one hand, the benefits of the jury system, and, on the other, the need to keep the court costs somewhat commensurate with the amount at issue in the lawsuit. Can it really be said that in requiring cases involving more than $20.00 but less than $200.00 to be tried to a six-person jury, Arizona has struck a blow "at the very foundation of our English law heritage." *Klopfer v. North Carolina, supra,* 87 S.Ct. at 993.

Similarly, the recent abolition by Great Britain of the unanimity rule, and the extensive debate which preceded it,[14] are important for present purposes because they illustrate the extent to which reasonable minds may differ on yet another aspect of civil jury

[14]The proposal was originally made by the British Home Secretary in the fall of 1966. It was debated in Parliament on April 26 and 27, 1967, and carried by a vote of 180 to 102. See KALVEN and ZEISEL, *The American Jury, Notes for an English Controversy,* 48 CHICAGO BAR RECORD 195 (1967). The debate, of course, concerned only the abolition of the unanimity rule as it applied to criminal jury trials, the English having abolished civil jury trials some 30 years ago.

trials. Manifestly, it cannot be said that abolition of the unanimity rule has rendered the British system one in which "a fair and enlightened system of justice [is] impossible."[15]

D. One of the most pressing problems currently facing the judicial systems of this nation is the lengthening period of time required for the adjudication of legal rights. In the words of Mr. Chief Justice Warren:

> . . . the delay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. . . . It is compromising the quantity and quality of justice available to the individual citizen and, in so doing, it leaves vulnerable throughout the world the reputation of the United States. . . .[16]

It is submitted that, in accordance with the observations of the Chief Justice quoted above, the States have not only a legitimate interest but also an obligation to lessen congestion and delay in their courts. It is highly likely that efforts toward this end may represent departures of one type or another from the civil jury

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[15] *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937). Arizona law also provides that the concurrence of nine or more jurors shall be sufficient to render a verdict in a civil case. ARIZ. REV. STAT. ANN. § 21-102B (1956). Although there appear to be no studies right on point, it is probably safe to say that a majority of the states depart from the Federal standard to one extent or another with regard either to the unanimity rule or the size of the jury. See Appendix to Mr. Justice Frankfurter's, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 768 (1965).

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[16] Warren, *Delay and Congestion in the Federal Courts*, 42 J. AM. JUD. SOC. 6-7 (1958).

which was known and used hundreds of years ago.[17] Arizona has already taken a step in this direction by providing for a six-person jury in small claims cases. Other courts might wish to experiment, for example, with a requirement that all cases involving less than a minimum amount be tried to the court. If, in a given instance, variations from the common law jury, in an effort to relieve congestion and delay, should amount to a denial of due process of law, the remedy could be provided by this Court and other courts. But there should not be imposed upon such efforts from the outset an arbitrary Twenty Dollar limitation.

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[17]Kalven and Zeisel observe that, "The argument about the jury in civil cases has become much involved in the problem of court congestion." KALVEN AND ZEISEL, THE AMERICAN JURY at 9. In an earlier work, ZEISEL, KALVEN and BUCHHOLZ, DELAY IN THE COURT (1959), inquiry is made into the causes and solutions for court delay. Chapter six is devoted to the relationship between civil jury trials and court congestion, as shown by a study of one court system, the Supreme Court of New York County. The conclusion was:

> With all the indicated limitations, we are satisfied that for New York our figure will serve its purpose, as an estimate for the savings that could be made if any portion of the Courts' present jury trials could be converted into bench trials: roughly 40 per cent of the former trial time would be saved. ZEISEL, KALVEN and BUCHHOLZ, *supra*, at 81.

CONCLUSION

This case does not involve "a single decision by a closely divided Court, unsupported by the confirmation of time. . . ."[18] The many authorities supporting the Respondent's position as to the federal issue extend over a period of more than three-quarters of a century. There is no contra authority.

The Petitioner has demonstrated no reason whatever why these authorities should be re-examined. Moreover, it affirmatively appears that this case does not adequately raise the central issue, and that the time is not now ripe for consideration of that issue. It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[18] *Kovacs v. Cooper*, 336 U.S., 77 89, 69 S.Ct. 448, 454 (1949) (Concurring opinion).

APPENDIX

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ROBERT D. MORGAN, Plaintiff vs. METRO-GOLDWYN-MAYER, INC., a Delaware corporation, Defendant	No. 145087 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter having come on regularly for hearing before the Court on June 10, 1964, on Defendant's Motion to Dismiss, and the Court having heard evidence on said date, and the hearing of evidence having continued through June 11, 12 and 15, respectively, and the Court having heard argument of counsel, taken the matter under advisement, and now being fully advised in the premises makes Findings of Fact, Conclusions of Law, and enters Judgment as follows:

FINDINGS OF FACT

1. The plaintiff, Robert D. Morgan, is, and at all times relevant hereto was, a citizen and resident of the state of California.

2. The Defendant, Metro-Goldwyn-Mayer, Inc., hereinafter referred to as "employer", is, and at all times relevant hereto was a corporation incorporated under and by virtue of the laws of the

State of Delaware and having a principal place of business in Culver City in the State of California.

3. On March 9, 1962, at the offices of employer in Culver City, California, Plaintiff entered into a written contract of employment with the employer whereby Plaintiff agreed to perform as a stunt man for employer in the filming of a motion picture entitled "HOW THE WEST WAS WON", which picture was to be partially filmed at various locations in the State of Arizona.

4. This Court can and does take judicial notice of the provisions of Sections 3600.5 and 3601 of the Labor Code of the State of California, as follows:

"§ 3600.5 Injuries in extraterritorial employment

"(a) Domestic employment; foreign injury. If an employee who has been hired or is regularly employed in this State receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in the case of his death, shall be entitled to compensation according to the law of this State.

"§ 3601. Exclusive remedy. Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death. (Stats. 1937, C. 90, p. 269, § 3601.)"

The Court can and does take judicial notice of the fact that the aforesaid statutes were in full force and effect on the date that plaintiff was injured in the course and scope of said employment in the State of Arizona as hereinafter set forth.

5. The employer fully complied with the laws of the State of California and had in full force and effect Workmen's Compensation Insurance in compliance with the laws of the State of

California which covered the plaintiff in his employment by employer.

6. The employer complied with the laws of the State of Arizona with respect to securing Workmen's Compensation Benefits for the plaintiff and the employer's other employees by obtaining a policy of insurance in the State Fund of Arizona through the Industrial Commission of Arizona which said policy was in full force and effect at all times relevant hereto.

7. The employer is a member of the movie industry, and among other things, engaged in the business of filming and making motion pictures.

8. The Court takes judicial notice of the case of *Gene Autry Productions against Industrial Commission,* 67 Ariz. 290, and its holding.

9. The Court can and does take judicial notice of the fact that subsequent to the decision of the Supreme Court of Arizona in the *Gene Autry Case,* Supra, the people of Arizona adopted an initiative measure which became effective on November 22, 1948, and which is now subsection E of Section 23-1041, Arizona Revised Statutes, which said initiative measure provided that in computing the average monthly wage of employees for purposes of Workmen's Compensation, there shall be excluded from such computation all amounts or wages or other compensation for services in excess of $1,000.00 per month.

10. That after the adoption of the aforesaid initiative measure the Industrial Commission of Arizona and the movie industry negotiated and agreed upon an endorsement to Workmen's Compensation Insurance policies issued to members of the movie industry in the State of Arizona, which endorsement is in the form of "Exhibit 25" in evidence, said exhibit being an endorsement to and a part of the Workmen's Compensation Insurance policy

issued to the employer in connection with the filming of the picture "HOW THE WEST WAS WON".

11. The purposes of the aforesaid endorsement to said Workmen's Compensation Insurance policies and the administrative practices adopted by the Industrial Commission of Arizona in connection with the use thereof is to give actual notice to employees of employers who are members of the movie industry of the existence of Workmen's Compensation Insurance Benefits for such employees; the right of such employees to reject the provisions of the Arizona Workmen's Compensation Law; that if they do not reject the law they are deemed to have accepted the benefits thereof; the amount of their compensation benefits and the manner in which the same shall be determined and to form an agreement between the employer and the Industrial Commission of Arizona with respect to the computation of premiums of such policies.

12. Subsequent to the adoption of the form of "Exhibit 25" in evidence by the Industrial Commission and the movie industry, the Industrial Commission of Arizona, in accordance with its administrative practices, assigns an investigator to each employer in the movie industry filming a picture or a portion of a picture in the State of Arizona to contact each employee of such employer, present "Exhibit 25" to such employee for signature and to explain, upon request, the content, purpose and function of said document.

13. In connection with his employment by employer, Plaintiff came from the State of California to Prescott, Arizona, on March 11, 1962. On that date employer maintained a business office in the St. Michael's Hotel in Prescott, Arizona, in connection with its filming location near Perkinsville, Arizona, and in the Arcadia Lodge Motel in Kingman, Arizona, in connection with its filming location near Oatman, Arizona.

14. On the 12th day of March, 1962, one Harry J. Hamilton, an employee and investigator of the Industrial Commission of Arizona, having been assigned by said Commission to the Prescott and Perkinsville office and location of the employer in connection with the filming of the picture "HOW THE WEST WAS WON", presented "Exhibit 25" in evidence to the plaintiff while on location at Perkinsville, Arizona, and said "Exhibit 25" was signed by the Plaintiff on that date.

15. The Plaintiff knew that the person presenting said "Exhibit 25" to him for signature was an employee of the Industrial Commission of Arizona, and he further knew that the document which he signed, among other things, provided that in case of injury in the course of his employment his Workmen's Compensation Benefits would be a maximum of 65% of $1,000.00 per month.

16. At the time the plaintiff signed "Exhibit 25" in evidence he was not mislead, defrauded, coerced or otherwise prohibited from reading or understanding all of the provisions thereof.

17. The employer had the statutory notice of Workmen's Compensation posted upon a bulletin board located near the paymaster's desk in its office in the St. Michael's Hotel in Prescott, Arizona.

18. The plaintiff was in the aforesaid office of the employer in the St. Michael's Hotel in Prescott, Arizona, on or about March 12, 1962, and received cash for a meal allowance from the auditor or paymaster of the employer in said office.

19. On or about March 18, 1962, plaintiff was transferred by employer to Kingman, Arizona, where he worked at its filming location at Oatman, Arizona, until the latter part of March, 1962.

20. Omitted.

21. In addition to the aforesaid offices at Prescott and King-

man, Arizona, from on or about March 12, 1962, until on or about April 25, 1962, employer maintained an office in the Velda Rose Motel east of Mesa, Arizona, and had a filming location on the Magma Railroad west of Superior, Arizona. Meal allowances and advances on salaries to employees working in connection with the filming on the Magma Railroad were paid by employer from its office in the Velda Rose Motel.

22. During the latter part of March, 1962, or early April, 1962, plaintiff was transferred from Kingman, Arizona, to Mesa, Arizona.

23. Various employees of employer stayed at the Ramada Inn in Phoenix and at the Superstition Ho Hotel at Apache Junction in connection with the filming work which employer did on the Magma Railroad. Bulletin boards for call sheets and other notices were maintained by employer in each of these hotels.

24. The employer had the statutory notice of Workmen's Compensation posted in its office in the Velda Rose Motel, east of Mesa, Arizona, first upon the end of the counter and then on the bulletin board from on or about March 12, 1962, until said office was closed on or about April 25, 1962.

25. The places where the Workman's Compensation notices were posted on defendant's premises were conspicuous but defendant did not prove that such a notice was posted in or about the Ramada Inn or the Superstition Ho Hotel or on the job site near Queens where it was doing filming work on the Magma Railroad at the time of plaintiff's injury.

26. The employer had the rejection slips referred to in Section 23-906, ARS, available at its office where plaintiff was employed and at each of its offices in the State of Arizona during all of the time of plaintiff's employment.

27. On April 9, 1962, while engaged in doing stunt work

on location near Superior, Arizona, in the course and scope of his employment, plaintiff sustained the injuries out of which his present claim arose.

28. Following his injuries on April 9, 1962, plaintiff was hospitalized in Good Samaritan Hospital in Phoenix, Arizona, until September 4, 1962, at which time he was released to go to a hospital in Los Angeles, California.

29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.

30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availability of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

32. After consulting with said attorneys and on or about April

23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled "Workman's Report of Injuries and Application for Benefits".

33. Thereafter and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September 1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled "Workman's Supplemental Claim for Compensation" and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid "Workman's Report of Injury and Application for Benefits" and "Workman's Supplemental Claim for Compensation" under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70.

36. On or about October 20, 1962, plaintiff consulted with attorneys Raoul D. Magana of Los Angeles, California, and Charles M. Brewer of Phoenix, Arizona, with respect to any option which he might have to sue his employer and thereafter continued to file supplemental claims for Workmen's Compensation and accepted checks in payment of Workmen's Compensation Benefits.

37. The last check which plaintiff received from the Industrial Commission of Arizona, prior to filing his complaint against

employer on December 13, 1962, was accepted, endorsed and cashed by the plaintiff in December of 1962.

CONCLUSIONS OF LAW

The Court concludes:

1. The plaintiff is charged with full kuowledge of the contents of "Exhibit 25" in evidence at all times relevant hereto, and if he failed to read any of the provisions of said document, such failure was due to his own negligence and neglect and was not the result of any fraud or deception on the part of the investigator of the Industrial Commission of Arizona who presented said Exhibit to the plaintiff at the time that he, the plaintiff, executed the same.

2. The plaintiff had actual notice of Workmen's Compensation coverage and of his right to reject the provisions of the Arizona Workmen's Compensation Law and his failure to reject the same conclusively bound him to accept said benefits for any injuries suffered in the course and scope of his employment.

3. Actual knowledge is always better than constructive notice and the actual knowledge of the plaintiff of the contents of "Exhibit 25" in evidence satisfied the requirements of the statutes of this State with respect to the giving of constructive notice by an employer of Workmen's Compensation and the right of employees to reject the benefits of the Act.

4. "Exhibit 25" in evidence, having been negotiated by the movie industry and the Industrial Commission of Arizona, and the same constituting an endorsement to the Workmen's Compensation Insurance Policy issued by the Industrial Commission to the employer and pursuant to the administrative practices adopted by the Industrial Commission of the State of Arizona with respect thereto and the plaintiff having actual knowledge of the contents

thereof and his rights thereunder fully complies with all of the legal requirements on the employer to give notice to its employees of the applicability of Workmen's Compensation Benefits and of the right of its employees to reject the provisions of the Workmen's Compensation Laws of the State of Arizona.

5. The employer fully complied with the provisions of Section 23-906, ARS, with respect to the availability of rejection slips but did not comply with said Section with respect to the continuous posting of the Workmen's Compensation notice referred to in said Section.

6. The plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer.

7. If plaintiff's exclusive remedy is not vested in the Industrial Accident Commission of the State of California, then his exclusive remedy against his employer is with the Industrial Commission of Arizona under the terms and provisions of the Workmen's Compensation Law of the State of Arizona.

8. By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefor the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss for lack of jurisdiction of this Court over the subject matter of plaintiff's complaint be granted, and that plaintiff's complaint be and it is hereby dismissed with prejudice.

DONE IN OPEN COURT This 5th day of January, 1965.

JACK D. H. HAYS
Judge of the Superior Court